IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD,
Plaintiff-Appellant

v.

SULLIVAN DRYDOCK & REPAIR CORPORATION,
Defendant.

ROY GRANATA, Etc.,
Intervenor-Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS AS AMICUS CURIAE

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STATEMENT

This brief is filed on behalf of Congress of Industrial Organizations (hereinafter referred to as "CIO") and certain affiliated organizations. Pursuant to the provisions of Rule 27(9) of this Court all of the parties to this proceeding have granted written consent to the filing of the brief.

The CIO is a voluntary unincorporated association with principal offices in Washington, D. C. It has affiliated with it labor unions with an aggregate membership of over six million workers employed in virtually every major industry in the United States and Canada. Among the CIO affiliates specifically joining in the presentation of this brief are organizations whose members are employed in such industries as steel, automobile, aircraft, electrical and radio appliances, textile, clothing, rubber, oil, food processing and packing, communications, transportation and others.

Among the members of CIO unions are approximately one and one-half million persons who are or have been members of the Armed Services and who, on returning to civilian life

have or will have rights to re-employment both under the Selective Service and Training Act of 1940 and under collective bargaining agreements between these unions and their employers. The membership of these employees in their respective unions has been maintained for them during their period of service without payment of dues or fees of any kind during their absence or on their return.

CIO unions thus have a very serious responsibility to these veterans and to veterans generally. In this proceeding it is the position of CIO that there is no issue of conflicting veteran and civilian interests. We appear in this proceeding in support of a construction of the re-employment provisions of the Selective Service and Training Act of 1940 which is not merely in keeping with the letter and spirit of the law but is also in the best interests of the veteran, for whose benefit the law was enacted. It is the concern of of the CIO that returning veterans, both in its own ranks and generally, be protected against the serious adverse consequences which will flow from the erroneous interpretation which is sought by the Plaintiff-Appellant.

QUESTION PRESENTED

There is no issue with respect to the plaintiff's right to be reinstated to the employment rolls of the employer. We do not contest—indeed we urge—his right to be given full seniority credit for his period of service in the armed forces as though he had continued at work in the employ of the company. With this accumulated credit we urge that the plaintiff and all veterans should be given all of the rights as to days of work and other benefits to which their seniority standing entitles them.

The sole issue is whether in addition to and above this restoration of status and credit for accumulated seniority the plaintiff is entitled to be given work even if this means laying off employees with greater seniority.

The position urged by the Plaintiff-Appellant herein has generally been designated as the doctrine of "superseniority". We cannot accept this as an accurate characterization. For reasons which will be apparent on a reading of this brief, the

doctrine urged by the Plaintiff actually involves a rejection of seniority principles and might better be designated as "non-*seniority*". *In view* of the widespread acceptance of the phrase, however, we shall make use of "superseniority" as a convenient label for purposes of brevity in our discussion.

ARGUMENT

I.

THE SUPERSENIORITY DOCTRINE IS CONTRARY TO THE LANGUAGE AND INTENT OF SECTION 8 OF THE SELECTIVE SERVICE AND TRAINING ACT OF 1940.

The Selective Service and Training Act was enacted in 1940. The language of its re-employment provisions contained in Section 8 was so clear and unmistakable in its import that employers, labor organizations and veterans operated under it for a period of almost four years in complete agreement and understanding as to its import. There is so little room in its terminology for any confusion that in this entire period there was never any suggestion or question by anyone that any doctrine such as that which later became known as "superseniority" could be based on its provisions.

In 1944, however, the Director of Selective Service threw a bomb-shell into the veteran re-employment problem by announcing for the first time his concept of the meaning of the statute. His announcement, later embodied in a memorandum which he sent to the Selective Service local boards for their guidance, (Memorandum 190-A) created confusion and consternation in a situation where previously there had been clarity and reason.

As we shall indicate at a later portion of this brief, the interpretation of the Director has been uniformly rejected by employers, employees and by most veterans' groups. The inconsistency and complexity into which his untenable position has forced him has compelled even the Director of Selective Service to modify and revise some aspects of his interpretation. He has, however, persisted in the main core of the doctrine which he created.

The disturbing fact about this background is that the so-called "superseniority" doctrine was created literally out of thin air. The Director of Selective Service has never indicated in any of his publications or elsewhere the precise language of the statute in which he finds any justification for his position.

A. The Statute

The statute declares that where a serviceman, otherwise meeting the requirements of the statute,

> "has left or leaves a position, other than a temporary position, in the employ of any employer" (Section 8 (b)),

then the employer in question, on receipt of appropriate application,

> "shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." (Section 8(b) (B).)

With respect to the status of an employee so "restored" to "such position," the section goes on to say:

> "Any person who is restored to a position in accordance with the provisions of Paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." (Section 8(c).)

1. The Court Below

The majority of the judges of the Circuit Court of Appeals pointed to the following considerations in reaching their conclusion, in the decision from which the appeal in the present case was taken:

(1) The position to which the veteran is to be restored is

either "such position" or "a position of like seniority, status and pay".

(2) "Such position" is the "position" which the veteran "has left".

(3) If the original position is no longer open the substitute position is one of "like seniority" constituting in effect a position of no greater and no less seniority than the lost position.

(4) To make the veterans' seniority standing on restoration to his original position different from his seniority standing on his original position would mean that the veteran who is restored to a substitute position is not entitled to receive as nearly complete a substitute for the lost original as possible. The veteran on the substitute position is to receive only "like seniority" to the position which the veteran left originally.

(5) Subsection (c) declares that the veteran is to be treated as if he had been "on furlough or leave of absence" and is to be "restored without loss of seniority". This evidences a Congressional purpose to preserve the veteran's existing and accumulated seniority but certainly not to create something other and different from his existing and accumulated seniority.

(6) The guarantee in subsection (c) against discharge without cause guarantees against a permanent end to the employment relationship, a separation, a dismissal. This is not the same as a "layoff".

This line of reasoning is clear. It follows the language of the statute and gives to that language the ordinary meaning dictated by common sense, normal usage, dictionary definition, or any other reasonable standard.

2. The "Superseniority" Argument

When we turn, on the other hand, to an examination of the argument of the proponents of superseniority we find extreme difficulty in determining the exact language in the statute in which that argument can find any foundation.

Is it the duty of the employer to "restore" the veteran to an appropriate position which is claimed to be the foundation for the doctrine of the Director of Selective Service?

Or is it the guarantee against "discharge" without cause for a period of one year which is offered as justification?

It would seem at first glance that the advocates of "superseniority" must necessarily base their argument on the duty of the employer to "restore" the veteran, since the doctrine of "superseniority" is urged with respect to the initial application of the veteran for restoration. The prohibition against "discharge" could obviously have no significance in a consideration of that initial application.

This analysis would then pose the issue as one of definition of the term "position". In the eyes of the superseniority proponents restoration to a "position" must mean placing the veteran physically at work in the performance of the duties of a job. In this analysis of the arguments of the proponents of "superseniority" a veteran is not restored to a "position" if he is placed on the employment rolls, given his full seniority rights, including accumulated seniority for his period of service, and given all of the rights and benefits which attach to his seniority standing. Succinctly stated the superseniority advocates must contend that a "position" means solely physical engagement in the work of the job.

There is an internal inconsistency in this line of argument to which neither the District Court nor the Selective Service Administration have ever addressed themselves. The proponents of superseniority have always assumed, as did the District Court, that the status for which they contend lasts for only one year. Under the statute, however, the one year limitation applies only to the guarantee against discharge without cause. If the right to "superseniority" arises out of the right to be restored to a "position," then it is a right without any specific time limit. The statute does not say that the "position" to which the veteran is to be restored is one which shall last for only one year. On the contrary, a "position" lasts as long as the veteran remains in the employ of the employer.

On the other hand, if the doctrine of superseniority rests on that portion of Section 8(c) which guarantees against discharge without cause for a period of one year, then there would be no basis for applying the doctrine to the initial application of the veteran for restoration. The guarantee against "discharge" by the express language of the statute comes into play only "*after* such restoration".

The District Court in the present case, making no analysis whatsover of the actual language of the statute, apparently sought to evade any resolution of this dilemma by referring to each of the days of layoff in the present case at one point as a "refusal to employ the plaintiff" (Finding of Fact No. IX) and elsewhere as a "discharge" (Conclusion of Law No. IV). The court gave no indication as to how the same act on the part of the employer could constitute both "refusal to employ" and also a "discharge".

Thus, neither of these portions of the statute can either of themselves or in combination, even as construed by the proponents of the "superseniority" doctrine, offer any complete justification for that doctrine. Disregarding that difficulty, however, the fact is that the language and history of the statute furnishes no support for the interpretation which is thus sought to be placed on the term "position" or on the term "discharge".

B. Restoration of the Veteran to His "Position" Does Not Require Continuous Physical Employment on the Job.

The statute declares that where a serviceman "has left or leaves a position" the employer is required to "restore" him to "such position." The *position* to which he is to be restored is thus the *position* which he "has left or leaves."

It may be noted at the outset therefore that if being restored to a "position" requires that one be put physically to work, and if failure to put a veteran physically at work on a job although justified by his seniority standing nevertheless constitutes a failure to restore the veteran to a "position", then the "position" which the veteran "has left or leaves" must also be one which involved his having been physically at work on the job.

Does this mean then that a veteran who at the time of his induction was in a state of layoff due to a temporary curtailment of operations has no rights under Section 8? Clearly, he was not physically at work on the job at the time of his induction. If this means that he did not have a "position," then he did not "leave" a position and is without any restoration rights.

We have no doubt that the supporters of superseniority will

shy away from this conclusion—and properly so. But if a veteran who was in a state of temporary layoff at the time of his induction can be deemed to have left a "position," how can it be said that restoration of that veteran "to such position" requires that he be given work regardless of his seniority status?

1. Meaning of "Position" in Employment Relationship

The simple fact is that the concept of a "position" involves an employer-employee relationship to which is attached a group of rights and obligations defined by the collective bargaining agreement or other documents which set forth the rules of employment in the employer's establishment. It is a relationship which continues through periods of temporary layoff, illness, etc., and whose termination is itself dependent on that same body of employment rules and regulations. A man is restored to his position when he is restored to that relationship and endowed with all the rights and benefits to which he is entitled in that relationship. The right to engage in the physical performance of the duties of the job is among the attributes of the relationship and the extent of that right is defined by the same body of rules and regulations.

This simple and clear formulation of the rights involved in the obligation of the employer to restore the veteran to his position is supported by common-sense understanding, by well-established industrial practice, by law, and by the full text of the statute involved in this case.

a. Dictionary definition.

As to the use of the term in common parlance, Webster's New International Dictionary, Unabridged, Second Edition, defines the word "position" as follows:

> "The manner in which anything is placed, arranged or disposed either with reference to the relative position of its parts, or with reference to other things.
>
> "Relative place, situation or standing . . . hence, office; employment; situation; place; as to reconsider one's position . . ."

b. Indications in other subdivisions of Section 8.

Reference to other portions of Section 8 can leave no doubt as to the meaning of the term.

The Language of Section 8(b)(B)

Section 8(b)(B) makes specific reference to a position "of like seniority, status and pay."

In referring to a "position" which is "of like seniority" the framers of the statute clearly indicate that a position as they use the term is something to which is attached the attribute of a group of "seniority" rights. It is quite obvious that the mere physical performance of a certain set of duties does not in and of itself carry with it any "seniority." All men doing the work of welding are performing the same duties, but they obviously do not hold the same "position" insofar as their seniority is concerned. Each man has a seniority which is dependent on his length of service and on the nature of the unit which is established by practice in the establishment as the proper unit for the computation of seniority.

When the drafters of the statute speak of a position of "like . . . status," they make equally clear that the "position" has attached to it something other than merely the concept of the performance of certain duties. Clearly, the "status" of each individual welder is not identical with that of all other welders. Their relative standing and job rights depend on many other factors.

How are "seniority" and "status" to be determined?

Seniority is not defined in the statute. The term has no fixed meaning in law or in fact. Quite the contrary, the variations in seniority systems are infinite. The systems and definitions vary in the American industrial picture from industry to industry, from plant to plant, and frequently from department to department within a single plant. [See "Union Agreement Provisions," Bulletin 686, U. S. Department of Labor 1942; "Collective Bargaining Contracts," Bureau of National Affairs (1941)]

In any seniority system a determination must be made as to the unit within which the relative standing which determines seniority is to be computed. Determinations must be made as to what constitutes a break in the continuous service

on which seniority is computed. A determination has to be made as to the extent of the rights which "seniority", once determined, actually confers. In some instances it becomes the sole determinant of promotions, demotions and layoffs. On the other hand, it may be simply a factor to be considered along with relative ability of the competing individuals to perform the job to which they seek promotion.

The answers to all these questions are found in the collective bargaining agreement or in other documents which reflect the established practices and rules in operation with respect to a specific "position."

When one speaks of a "position" of "like seniority" or of "like status," one recognizes that the rights and benefits which attach to a "position" are defined by the established or agreed upon employment rules and practices governing the "position."

The same is true with respect to all of the other incidents and attributes of a man's position in an establishment, including such matters, for example, as vacation rights, place of work, shift assignment, manner of payment, etc.

The Language of Section 8(c)

Section 8(c) further emphasizes the correctness of our construction of the term "position". This section declares that when restored to a position the veteran is to be (1) considered "as having been on furlough or leave of absence"; (2) deemed to be restored "without loss of seniority"; (3) "entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence", and (4) is not to be discharged without cause within one year.

The fourth of these items we leave for more extended discussion in the section of this brief immediately following. The first three, however, give very clear evidence of the nature of the "position" to which the statute makes reference.

The status of one who has been "on furlough or leave of absence" can certainly not result in a "position which is *different* from, or has attributes of seniority or other elements which are added to, the "position" from which the employee has been furloughed or has taken leave.

By the same token if it were the intent of the legislature to bring about the reinstatement of the veteran to a situation in which he is entitled to work every day and all day regardless of his seniority status, then there would be no significance in a special provision to assure his restoration "without loss of "seniority." On the contrary, however, the legislature specifically recognized and accepted the existence of standard systems of seniority in American industry and directed that in accordance with those systems the veterans' rights under those systems be *preserved*. The protection given the veteran was a protection *within* the framework of the seniority system. Congress did not seek to sweep aside the seniority system.

As the United States District Court for the Southern District of Illinois has said on this precise issue:

> "The principle of seniority among workmen in industrial plants has long been the cornerstone of harmonious relations between the employer and employee and today has become generally accepted by both capital and labor. We should not lightly attribute to Congress the intention of overthrowing and disturbing this relationship in the absence of language clearly evidencing such intent. The Act itself recognizes the principle." *Olin Industries, Inc.* v. *Barnett*, Civil No. 618, U. S. Dist. Ct. S. D., Illinois, January 24, 1946, Briggle, J. (reported in Vol. 17, Labor Relations Reporter, p. 756).

c. The Selective Service Director has found it impossible to adhere consistently to his untenable position.

The foregoing discussion has indicated that the terms of the statute clearly recognize that a "position" does not involve a limited concept merely of physical engagement in the work of a job, as the superseniority doctrine implies, but carries with it all the attributes of the employment relationship as determined by the employment rules and practices in effect at the plant.

The Director of Selective Service has himself found it impossible to carry out the logical implications of his own limited concept.

Thus the original document in which the superseniority doctrine made its debut in 1944 has undergone substantial

revision in content even while this case has been wending its way through the courts. In Memorandum 190-A as originally issued the Director of Selective Service recognized that once he had declared, under "superseniority," that there is an absolute priority right in the physical tasks of a specific job, then each of several successive job holders could not be given the same absolute priority. As a result he was forced to the conclusion that where a man who entered the Armed Forces was replaced by another and the latter was in turn drafted, the second man had *no re-employment rights at all.* This conclusion was reached by declaring that one who takes the job formerly occupied by a veteran is necessarily a "temporary" employee.

In September, 1945, Memorandum 190-A was superseded by a new Handbook* issued by the Director of Selective Service. This time the Director decided that the person who takes a job formerly occupied by a veteran is not necessarily a "temporary" employee (Handbook, Section 303.3).

Having recognized that possibility, the Selective Service Director was faced with the question as to which of two returning veterans would be entitled to priority in the event that at the time of their return or after restoration there should be insufficient work for both. In this situation the Selective Service Director decided to recognize the principle of seniority [Handbook, Section 306.3(c)].

How this is to be reconciled with the duty of the employer to restore each veteran to his "position" does not appear. If restoration to his position means putting the veteran physically to work, and if seniority of non-veterans is no excuse, there is no indication as to why seniority of other veterans is to be deemed adequate justification for failure to comply.

Thus apparently at the whim of the Director of Selective Service the present doctrine accords a partial recognition to seniority as determined by the established employment practices, but arbitrarily sets its own limits and refuses to accept the full implications of a full seniority system.

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* "Handbook: Veteran's Assistance Program of the Selective Service System", hereinafter referred to as "Handbook".

It is interesting in this connection to recall that there is presently in effect a statute providing re-employment rights for persons who left employment in order to enter the Merchant Marine (Act of June 23, 1943).

The wording is absolutely identical in its relevant portions with that of Section 8 of the Selective Service and Training Act of 1940.

Under these circumstances presumably the Selective Service Director would be forced to merge the seniority of the Merchant Marine veterans and the land and naval force veterans. The result would then be two seniority systems side by side; one in effect by virtue of the established employment practices at the plant; and the other covering relationships among veterans and Merchant Marine personnel only, established by fiat of the Director of Selective Service.

Moreover, it is equally unclear whether the Director of Selective Service will undertake to lay down all of the details of the seniority system which he has established among the veterans. For example, will he determine the units within which seniority is to be computed and applied? Will he promulgate the rules as to when and under what circumstance the continuous service of an employee is deemed to be broken so that he loses his seniority status? Will the Director of Selective Service determine whether seniority alone governs promotions or whether other factors are to be considered?

If these functions will not be undertaken by the Director of Selective Service then we would assume that it will be the established seniority rules and practice at the employer's establishment which will make these determinations. If that is the case then it is hard to see on what basis the Director of Selective Service can rationalize his willingness to accept the employment rules as determinants of the rights involved in a "position" insofar as the competing rights of veterans are involved, while at the same time refusing to accept those established practices as the determinants of the rights attached to a "position" for all purposes.

These are merely some of the complications introduced, wittingly or unwittingly, by the departure of the Director of Selective Service from the clear terms of the statute. Cutting

through all of this is the simple and common sense conclusion stated succinctly by the United States District Court for the Southern District of Michigan in the following language:

> "The term 'restore such person to such position' as used in the Act, means reinstatement of such person to the same relative place, rank or standing in the employment of his employer as he would have had if he had not been required to leave his employment for World War II training and service in compliance with the Act." *Droste* v. *Nash-Kelvinator Corporation,* Civil No. 5010, U. S. Dist. Ct. S.D. Michigan, January 30, 1946, Lederle, J. (reported in Vol. 17 Labor Relations Reporter, p. 761). See also *Olin Industries, Inc.* v. *Barnett, supra.*

The conclusion is well stated in summary form by one able arbitrator who was faced with the issue created by the unwarranted interpretation publicized by the Selective Service Director:

> "The language of the statute under consideration is clear and not at all ambiguous. Obviously it is intended to assure those selected for service and training that their old job will be available with its emoluments and their seniority unimpaired just as though they had continued at work. It provides that a person who 'has left or leaves a position' in the employ of a private employer, and who returns under the conditions stated, shall be restored 'to such position or to a position of like seniority, status and pay'. The word restore means to put back into the original place or state. The phrase 'or to a position of like seniority' indicates clearly that seniority is considered one of the attributes of a position with a private employer.
>
> "Likewise in Section 8(c) it states that a person so restored 'shall be considered as being on furlough or leave of absence' during his service, and 'shall be so restored without loss of seniority'. The language thus far clearly indicates an intention to assure the trainee that he will not lose his accumulated seniority rights. There is not one word which is susceptible of being interpreted as intending to give him something more than he would have had if he had remained at work." (Dow Chemical Company and United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, November 29, 1945, Dudley E. Whiting, Arbitrator.)

2. Legislative History

This clear and common sense view is fully supported by what clues are available in the Congressional discussion leading up to enactment of the statute.

The following colloquy on the floor of the Senate is particularly instructive (86 Cong. Rec., 10107, 76th Cong., 3rd Sess., August 9, 1940):

> "SENATOR DANAHER: Is it meant . . . that if a man goes out to serve his country . . . and comes back, he assumes his prior status, less one year's payment?"
>
> "SENATOR BANKHEAD: That is what this bill intends, as I understand. This is what the members of the committee thought should be and could be done!"

Senator Barkley, one of the leading proponents of the Act, stated during the debate (page 10108):

> ". . . it seems to me we could not require a company to restore the employment of men who, if there had been no military leave, might have been discharged during the year because of a necessary reduction of the company's force."

Senator Sheppard in presenting the bill on the Senate floor stated (page 10093) with reference to Section 8 that:

> "It attempts to prevent loss of seniority, accrued employment benefits, including participating in insurance, pension, bonus, and other benefit programs."

This has in general been the spirit of court decisions upholding the constitutionality of the Act and applying its terms. See *Hall* v. *Union Light, Etc., Company*, 53 F. Sup. 817, at 818 and *Grasso* v. *Crowhurst*, 58 F. Sup. 857, decided February 15, 1945.

In the court below some effort was made to draw sustenance for the superseniority interpretation from the fact that the provisions of the Selective Service Act were extended by Congress after the views of the Director of Selective Service had been made public. It is suggested that this constitutes implied Congressional acceptance of the Director's interpretation. A few brief comments may be made with respect to this suggestion:

(1) As we shall indicate in a subsequent portion of this brief, the Director operates under no statutory power to issue any binding or authoritative interpretations of the law. He does not administer or enforce the re-employment sections of the law. At the time when his views were made public they were contrary to the generally accepted interpretation of the law and his views were sharply and immediately disputed by employers and employees alike. Under these circumstances it is hard to see what obligation can be found on the part of Congress to take any cognizance of his views at the time of the extension of the law.

(2) Other agencies of Government have issued interpretations in conflict with that of the Director of Selective Service.

(3) Since the ruling of the court below in the present case the House of Representatives has passed a bill calling for further extension of the Act. The argument might with equal validity be made—but we shall refrain from doing so—that at least one House of our National Legislature has thus accepted an interpretation of the law at variance with the Director of Selective Service.

In net, it seems fair to say that at best when Congress extended the law its interpretation was in a state of dispute. Congress apparently preferred to leave the solution of that dispute to the courts.

C. The Superseniority Doctrine Cannot Be Supported by the Statutory Prohibition Against "Discharge Without Cause."

We turn now to a determination as to whether the superseniority doctrine can find any support in the portion of the statute which declares that after restoration to his job the veteran may not be "discharged from such position without cause" for a period of one year (Section 8(c)).

The "discharge" provision of the statute is very expressly part of a sentence which commences: "Any person who is restored to a position . . ." The discharge provisions of the statute can come into play only after the veteran has been "restored." Any doubt on this score is further dispelled not merely by any understanding of the meaning of the "discharge" but further by the express language:

"and shall not be discharged from such position without cause within one year *after such restoration.*"

We are thus faced at the outset with the unavoidable fact that the "discharge" language cannot support "superseniority" in its entirety. Let us assume, however, that by some sleight of hand this initial hurdle is eliminated. Is there anything in a guarantee against "discharge without cause" which can be said to declare that a veteran once restored to his position is immune from temporary layoff in accordance with proper seniority rules when the volume of work is reduced?

That conclusion can be reached only by declaring, as did the District Court, that any layoff even for a single day is a discharge.

It is a short and sufficient answer to this to declare that it simply does violence to the accepted meaning of the terms "discharge" and "layoff".

The Circuit Court of Appeals in the present case quite appropriately quoted from the Oxford Dictionary definition of "discharge" (Vol. II, page 412, subtitle "discharge" 1, 3) as follows:

"To relieve of a charge or office; (more usually) to dismiss from office, service or employment; to cashier."

This the dictionary distinguishes from "layoff" (Supplement page 8):

"A period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off season."

The court in the case of *Droste* v. *Nash-Kelvinator*, *supra*, said:

". . . plaintiff contends that the provision 'shall not be discharged for one year after such restoration' should be interpreted to read 'shall not be transferred or laid off from such job classification regardless of his seniority, unless the rights of another veteran of the World War II are involved.' In order to construe the Act in this manner, it is necessary to add language to the Act which is not there, or to disregard entirely the usual and well settled definition of the word 'discharge'.

> "10. 'A discharge presumptively means that the employer no longer needs or desires his services; that he is done with him and all contract relations are at an end.' *Stitt* v. *Locomotive Engineers Assoc.*, 177 Mich. 207."

The arbitrator to whose decision reference has previously been made stated the conclusion succinctly:

> "Is 'discharge' synonymous with 'layoff'? Discharge is universally recognized as meaning to terminate employment, whereas layoff means to suspend or cause to cease work for a time. The courts have recognized that difference in these words as does the dictionary. See 24 Words and Phrases 447; Teller on Labor Disputes and Collective Bargaining, Vol. 2, Sec. 276, p. 753; North Whittier Heights Citrus Ass'n v. NLRB, 109 Fed. (2nd) 76; Waterman Steamship Co. v. NLRB, 309 U. S. 206." Dow Chemical Company arbitration, cited above.

It is interesting, moreover, to consider some of the implications of the notion that a day's layoff is a discharge. Presumably the proponents of superseniority would then declare that where there is a complete company shutdown for a single day the resulting "discharge" for that day is not prohibited because it is not "without cause." Having been "discharged" with proper cause, is the veteran then to be told that he has no right to return to the job the following day because his employment has been ended?

The Director of Selective Service has attempted in his recent Handbook to avoid this consequence by suggesting that the veteran's right to reinstatement after a layoff is the same right that he had initially in making application for restoration and that right lasts for one year. (Part 3, Chapter 6, paragraph 5(b).)

The simple fact is that this is not so.

The statute provides for a single application for reinstatement which must be made within ninety days of the date of discharge. Moreover, if this right of reinstatement persists for a year, would the Director of Selective Service suggest that where a veteran is discharged for misconduct, drunkenness, theft, etc., he nevertheless has the right to reapply and the

right to be restored to his "position" simply by making application the following day so long as the one year period has not passed?

Thus by attempting to make a layoff equivalent to a discharge, the superseniority doctrine puts the veteran in the situation where his position is ended and his rights are lost any time the plant closes down for however short a period. That is clearly not what was intended and is a distorted consequence that can arise only from the warped interpretation which the Director of Selective Service has placed upon the statute.

The court in the *Droste* case, *supra*, pointed out another anomalous consequence of the position taken by the Director of Selective Service:

> "If 'layoff' is construed to mean the same thing as 'discharge' the World War II veteran who was inducted into the Service while he was temporarily laid off could not be restored to a position, but would have to be rehired. The Act makes no provision for rehiring. It is only by using the usual and accepted interpretation of the term 'restore such person to such position' that the rights of all returned veterans can be protected."

Once we return to the very clear and simple language of the statute and its obvious meaning in the light of well understood and long established concepts of employment relationships, all of these complexities and difficulties disappear. We may turn once more for a simple and direct explanation to the arbitration decision previously cited:

> "After the restoration or hiring, there exists a status of employment which is terminated by discharge or quitting. Many factors may determine whether one actually works on any given day while his status of employment continues, such as, he may be sick, the plant may be closed, he may be on vacation, he may be temporarily laid off, he may have been injured, etc., but none of them terminate his employment nor have any bearing upon the fact that he has been restored to his position in compliance with the Act." *Dow Chemical Company* arbitration, *supra*.

II.

THE INTERPRETATION ON WHICH SUPERSENIORITY MUST REST ADVERSELY AFFECTS THE RE-EMPLOYMENT RIGHTS OF VETERANS AND DEPRIVES THEM OF RIGHTS AND BENEFITS TO WHICH THEY ARE LEGITIMATELY ENTITLED UNDER THE SELECTIVE SERVICE AND TRAINING ACT OF 1940.

Under the court's construction, many veterans will be deprived of any substantial values that the statute might otherwise confer upon them.

Some reference has been made in the analysis under Point I to consequences which logically flow from the superseniority doctrine. For convenience, a few of these consequences may be outlined under three headings.

1. Some veterans, properly entitled to protection under the statute, would be declared not to have held any "position" at the time of their induction.

2. Some veterans who concededly left a "position" to enter the service, on their return would be deprived of benefits to which they are properly entitled.

3. Even after restoration to their positions veterans would logically be subject to a constant threat of termination of their "position" contrary to the intent of the statute and contrary to the protections now afforded by union agreements.

1. Veterans without "positions" at time of induction.

Reference has been made previously to this anomalous consequence of the superseniority doctrine. If the word "position" to which the veteran is to be restored requires as an element that he be physically engaged in the duties of the job, then any veteran who at the time of his induction was not physically engaged in the duties of his job could not be said to have left a "position" as required by the statute. This would operate to deny the benefits of the Act to veterans who were at the time of their induction in a state of temporary layoff or on leave of absence or away from their jobs because of illness.

The same consequence indeed would flow from the lower court's conception of the nature of a "discharge." If a single

day's layoff constitutes a discharge, then a veteran who at the time of his induction was away from his job because of a temporary layoff can be said to have been "discharged" prior to his induction.

2. Veterans denied benefits on their return.

By the same analysis, if a veteran returns to find his plant in a state of temporary shutdown due to retooling, material shortage, strike, or any other factor, the superseniority proponents would say that his "position" does not exist. Nor, by the same token, does any "position of like seniority, status or pay" exist. On application filed by the veteran the employer would be quite within his rights in stating that within the meaning of the language of the statute it is "impossible or unreasonable" to restore the veteran.

Counsel for the plaintiff in his brief in the District Court (page 23) quite callously stated this conclusion:

> "In all of this discussion, it is, of course, conceded that, where, due to a change of condition, no similar work is being done for the employer at the time of the veteran's return, there is no obligation to create a job."

Such a concession is required by the superseniority doctrine for which plaintiff's counsel was contending, but it is a concession which is a betrayal of the best interests of veterans generally and an attempted destruction of rights to which the statute properly entitles them.

Obviously, under any sensible understanding of the facts of the situation and of the meaning of the word "position" the veteran's "position" does exist. He is entitled to be restored to the employer's employment rolls even if no work is immediately available, and is entitled to be recalled to work in accordance with his seniority. Such a "position," however, the proponents of superseniority do not recognize.

There is another type of situation in which the superseniority doctrine would deny to the veteran on his return benefits to which he is entitled. In very many plants labor organizations during the war have succeeded in advancing the welfare of the employees and increasing the benefits and rights which attach to the "position" which the veteran left. That

"position" may have had added to it vacation rights, special promotion rights, extra bonus rights, and many others.

In the limited concept of the superseniority doctrine a man who left a job of welding is entitled to restoration to the job of welding. The superseniority doctrine rejects the notion that the "position" has attached to it all of the rights and limitations and obligations defined by the employment rules.

An alert employer, therefore, might quite validly contend that in restoring the man to the job of welding he has restored the man to the "position" as defined by the superseniority doctrine. The "position" as defined by common sense and common understanding should, however, include all of the attributes both new and old which attach to the "position" as of the time of the veteran's return.

3. The veteran is under constant threat of termination of his "position."

Reference has been made to this consequence in Point I. By ordinary understanding a "discharge" constitutes a termination of employment. If every layoff is a discharge, then once a veteran has been laid off under circumstances which even the superseniority doctrine would recognize as valid—such as a temporary plant shutdown—then the veteran has been "discharged" and his employment is at an end.

All other employees, protected by the ordinary applicable employment rules as usually embodied in the union agreement have a continuing employment status which entitles them automatically to be recalled in order of seniority. The veteran, however, is left only the slim reed of the completely unsupported judgment of the Director of Selective Service that he may reapply for his job as in the case of his initial return from service. The Director of Selective Service does not suggest in his handbook what the veteran is to reply to an employer who may point out that applications for "restoration" to a position must be made within ninety days of the date of discharge from the armed services.

4. In its broader implications superseniority is contrary to the veterans best interests.

The preceding paragraphs indicate that even in the narrowest view, superseniority is a threat of the veteran's welfare.

In considering the warped and unsupported construction involved in the superseniority doctrine, however, the court has equally a right to view the doctrine in its broader impact on veterans as a group and as a part of the working population of the country. The doctrine seeks to throw out of joint, complicate and impede in each plant an established seniority system which has usually been developed over years of negotiation between labor and management and which represents a practical and equitable judgment as to the proper means of job allocation with the greatest protection for the rights of individual workers.

Approximately 80 percent of the veterans who have returned or will return from the armed services are men who had no employment before entering the service of a nature such as to entitle them to any application of Section 8. Of the remaining 20 percent, by far the largest proportion have had and may be expected to have no difficulty with their restoration to their old jobs. This superseniority doctrine, therefore, can conceivably offer its deceptive "benefits" only to a very slight percentage of the total number of veterans.

That minute and at best illusory benefit is to be purchased at the expense of a weakening blow at the established seniority system which will be the long-range reliance not merely of the veteran but of all of the employees in the plant for the job security which all are seeking. It is purchased at the expense of a distortion of the distinction between discharges and layoffs which if carried into other fields endangers well-established rights and benefits, vacation rights, pension rights, re-employment rights after layoffs, and innumerable others for which the labor movement has fought and which the labor movement has secured for veterans and non-veterans alike.

The labor movement generally has addressed itself consistently to the specific problems of veterans. The veteran is afforded an overwhelmingly larger amount of protection under union agreements than under any interpretation of the Selective Service and Training Act. Protections against discharge and assurances of seniority rights are his without regard to any such technical questions as the nature of his army dis-

charge or whether some job held in years past was or was not "temporary." He is not left to the lengthy and inadequate remedy of court action to enforce his rights. The union agreement throws the power of the organization, the grievance committee and relatively rapid arbitration procedure behind the veteran. The unions have sought and obtained special contract provisions for disabled veterans (*Matter of Columbia Machinery Engineering Corporation;* 19 WLR 68), or special provisions to guarantee vacation eligibility for veterans (*Matter of N. A. Woodworth Company,* 20 WLR 329), as well as the addition of contractual guarantees to the statutory protection already set forth in the law (*Matter of Building Managers Association of Chicago,* 7 WLR 448; *Matter of Building Managers Association of Chicago,* 11 WLR 88; *Matter of Retail Grocers Association,* 15 WLR 22).

On the other hand, the approach taken by the proponents of superseniority seeks in the purported interests of a small percentage of all veterans to create a conflict of interest or a cleavage between veterans on the one side and on the other side their fellow workers in the plants and in the labor organizations which are seeking to advance the interests of both. More significantly, it seeks to set off veterans of this war not merely as against their fellow workers generally but also as against large numbers of World War I veterans who, with many years of seniority may find themselves set aside by a person with six months of service now claiming the job.

It is small wonder then that when confronted with direct question as to whether they preferred the normally applicable seniority doctrines or the illusory "benefits" of superseniority, 85 percent of veterans questioned by one employer expressed a preference for the former (17 Labor Relations Reporter, 775).

III.

THE INTERPRETATION ON WHICH SUPERSENIORITY MUST REST CONTRARY TO PUBLIC POLICY AND WILL HAVE SERIOUSLY HARMFUL EFFECTS ON THE NATIONAL WELFARE.

On this point we may turn at the outset to some expert testimony in the form of a decision rendered on this very issue

by an arbitrator familiar by virtue of long experience in industrial relations with the problems of labor and management. His conclusion was that:

> "To give to the veterans seniority standing ahead of all others would entail a serious economic and social upheaval. The older workers carrying family responsibilities which come with maturing years would find themselves displaced, despite their long service in industry, by younger men who, as a rule, have only themselves to care for. Established industrial organizations would be disrupted and thrown into confusion. Trained and proven workers would have to be dropped, their places to be taken by men of relatively small experience with skills as yet not fully developed. The task of reconversion to a peacetime economy, difficult at best, would be hampered to a degree that might well prove dangerous. Unemployment, if it comes, will be all the more devastating since it would fall most heavily on those of our working people who bear the greatest financial burden and who, by very reason of their years and length of employment at a given task, would find readjustment most difficult." (United Steelworkers of America and Timken Roller Bearing Company, decided March 13, 1945, Herman A. Gray, Arbitrator.)

The same thought is expressed by the court in the case of *Olin Industries* v. *Barnett*, *supra*. Reaching a conclusion opposed to superseniority the court declared:

> "A different construction would most certainly create such an unrest and upheaval in industrial relations as would retard economic recovery and be of no lasting benefit to anyone, including the veteran."

The full implications of the superseniority doctrine should be evaluated against the background of an understanding of the industrial picture in many establishments in this reconversion period. There are innumerable plants in this country which have mushroomed during the war period to employment rolls several times that which prevailed in the prewar period. In this expansion they have hired large numbers of men who have served for six months, one year or two years and then been inducted into the armed services. Now in the postwar period, returning to their former peacetime operations, the

plants return to their earlier level of employment. They would be precluded by the concept of superseniority from retaining their original employees. They are required to fill their requirements from among the thousands hired during the war. They are faced with a requirement of virtually 100 percent turnover and a requirement of operation with a group of employees almost all of whom will have been out of touch with the job for three or four years.

This is not a hypothetical situation. It is one which is being repeated in plant after plant throughout the country. It is precisely the picture posed, for example, in the facts of one recent court decision directly on the issue now before this court. *Olin Industries, Inc.*, v. *Barnett, supra.* The employer in that case had an average of 2,333 employees in the years 1935 to 1939. In 1943 the employment rolls had gone to 11,926. In September, 1945, after the end of hostilities the number had fallen back to 4,369. During the War, however, 3,459 employees had entered military service, a total approximately 50 percent greater than the total prewar employment, and, all under superseniority, entitled to priority over prewar employees.

In one category of employment in the same plant, a prewar employment figure of 30 casters rose to 100 during the war and fell to 24 after the war. All of the 24 were persons long in the company's employ but without military service. In the case involved, a veteran with less than 9 months' employment as a caster was seeking to displace an employee with 12 years of employment with the company, 5 as a caster.

The court itself outlined the facts of one of the specific situations involved in the case, as follows:

> "Defendant Slaten now has more than 32 years' service with the plaintiff. After 28 years he was promoted to be an adjustor supervisor. Bonds was employed by the company in 1942, at the near peak of their war expansion, and became an adjuster supervisor in ten months, and later entered military service. His contention now is that upon his return he is entitled under the Act to oust Slaten from his job. Such a construction of the Act can in no sense be squared with ordinary justice and fair play and I cannot believe that Congress so intended."

Older workers carrying family responsibilities which come with mature years are thus threatened with displacement despite long service in industry. The displaced older workers include veterans of World War I, wives or parents of World War II veterans, and indeed, even veterans of World War II who have exhausted their one year of special protection. Established industrial organizations are threatened with disruption and confusion by the dropping of entire staffs, including trained workers, in favor of a completely new and young body of employees, many with skills not yet developed to the point necessary for carrying on the work effectively. Veteran is being pitted against non-veteran in a scramble for jobs. Basic protections essential in the long run to veteran and non-veteran alike are being seriously undermined.

It is no wonder, therefore, that there has been such unanimity of opinion on the part of employers and employees alike, as well as on the part of many veterans' groups, in opposition to the position of the Director of Selective Service. The reaction of some employers almost immediately on the heels of the publication of the views of the Director are outlined in Fortune Magazine for October 1944, at page 258, et seq.

The Association of American Railroads, in an opinion adopted by its Law Committee on September 21, 1944, declared (15 LRR 233):

> "The requirement . . . that the returning veteran must be restored to work 'even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority' is not supported by any direct language of the statute . . .
>
> "It is obvious that compliance with paragraph 1(c) would have the effect of giving added seniority status to the soldier in lieu of 'like seniority'. The Selective Service Memorandum itself is inconsistent with and shows error of paragraph 1(c) by the provision in paragraph 1(f) that
>
> > 'the seniority of a person in service accumulated during such service to the same extent and in the same manner as if such person had remained in continuous employment.'
>
> ". . . Congress intended that he should not be preju-

diced with respect to his employment by being called for military training or service; it did not intend to effect an enlargement by reason of such calling."

A similar view has been expressed by the American Short Line Railroad Association in a memorandum dated October 6, 1944 (15 LRR 233).

The Journal of Commerce on September 20, 1944, in a story headed "Super-Seniority For War Veterans Held Unworkable; Concern as to Soundness of Selective Service Rule Voiced by Industry" went on to say:

> "In some industries, however, application of the super-seniority rule will deprive employers of the service of many skilled workers, for want of whom reconversion and re-employment may be retarded, it is pointed out. This is particularly true of industries in which employment has greatly increased during the war, such as aviation, shipbuilding, and machinery manufacturing. In some cases, the number of returning veterans will be far greater than the normal peacetime employment of individual companies. . . .
>
> "When layoffs are made necessary by reconversion, further complications are feared by industrialists. Selective Service has ruled that servicemen are to be exempt from layoffs during their first year of re-employment in their original job under the provisions of the Act, which state that the veteran may not be discharged 'without cause' during this period. While it is expected that large-scale shutdowns for reconversion may be recognized by Selective Service as a legal basis for laying off re-employed veterans, industrialists fear that the policy thus far pursued by Selective Service will result in the displacement of veterans of World War I and of other deserving and vitally needed workers.
>
> "Industrialists hope that Selective Service will not interpret the re-employment law in such a way as to encourage a cleavage between veterans and civilian workers. The resultant strife would prove a great handicap to employers in effecting a smooth reconversion, it is pointed out."

To similar effect, see Industrial Relations Memorandum No. 88 of Industrial Relations Counselors, Inc., entitled "Re-employment of Veterans", dated April 17, 1944; also "Senior-

ity: A Memo to Government" in the May 1944 issue of "Factory Management and Maintenance" (McGraw-Hill).

The National Legislative Representative and Rehabilitation Director of the Veterans of Foreign Wars has said:

> "On its face the rule may seem to give a lot of security to servicemen. Actually it is a gold brick. For one thing, it may lead to the dismissal of veterans of the first World War to make room for those of this war.
>
> "What's most serious, is that the ruling would wreck existing union seniority systems—and in the end veterans would thus be left with practically no protection at all.
>
> "The best and fairest method is that provided for in union contracts—under which returning soldiers regain their former seniority, plus accumulated seniority for the time they were in uniform. That means a square deal all around." (Interview published in "Labor," official organ of the Railway Brotherhoods, August 26, 1944.)

The American Veterans of World War II, speaking for a membership of 100,000 has stated that its policy is to demand jobs for all and not just World War II veterans with statutory reinstatement rights, and that to require the discharge of a civilian to make room for a veteran would be "robbing Peter to pay Paul" (15 LRR 198).

The American Veterans Committee has taken a similar position (Bulletin, American Veterans Committee, July 15, 1945).

Commentaries in legal journals have agreed in the conclusion that the superseniority doctrine is not merely invalid but extremely undesirable. See, for example, *Veterans Reemployment Rights under Selective Service Interpretations*, 54 Yale Law Journal 417, March 1945; *Veterans Seniority*, 5 Lawyers Guild Review 266.

IV.

THE OVERWHELMING WEIGHT OF AUTHORITY IS OPPOSED TO THE INTERPRETATION ON WHICH SUPERSENIORITY MUST REST.

Prior to the publication of the superseniority interpretation sponsored by the Director of Selective Service there had been

virtually no issue or problem of any sort in the minds of labor, management or returning veterans as to the meaning of the re-employment provisions of the Selective Service and Training Act of 1940. There was no litigation and no occasion for decision by arbitrator or court.

The intrusion of the Director of Selective Service into a field with which he was obviously not very familiar has provoked a flurry of controversy and litigation. There have been decisions by four courts directly on the issue in the present case, two of these being the decisions of the two courts through which the instant case has passed on its way to this Court. There have been decisions by a large number of arbitrators, under collective bargaining agreements, to whom employers and labor organizations, their labor-management relations thrown into turmoil, have been forced to resort. Conflicting views have been offered by various federal agencies, with the Director of Selective Service until very recently standing entirely alone in his unsupported judgment.

At the present time, it is fair to state that the overwhelming body of authority—judicial, arbitration and administrative—is opposed to the view originated and espoused by the Director of Selective Service.

1. Court Decisions

Two Federal Courts, other than those directly involved in the present case, have ruled directly on the issue presented in the present case. Both courts have rejected the doctrine of superseniority. *Olin Industries, Inc.* v. *Barnett*, Civil No. 618, U. S. Dist. Ct. S.D., S.D. Illinois, January 24, 1946, Briggle, J. (reported in Vol. 17, Labor Relations Reporter 756); *Droste* v. *Nash-Kelvinator Corporation*, Civil No. 5010, U. S. Dist. Ct. E.D., S.D. Mich., January 30, 1946, Lederle, J. (reported in Vol. 17, Labor Relations Reporter, 761).

One court has expressed its views collaterally on the issue. The case before it, however, in no wise involved a superseniority problem, since the veteran involved had been without dispute reinstated and was at work. The sole issue before the court was the extent to which his seniority rights could be regarded as frozen by the statute so that they could not be

affected by a collective bargaining agreement made after his return—indeed more than a year after his return. *Trailmobile Co.* v. *Whirls*, C.C.A. 6, 17 Labor Relations Reporter 1196.

2. Arbitration Decisions

Some reference has been made previously to individual arbitrators' decisions. It is important to recognize that these are not merely isolated instances. The issue has been coming up with increasing frequency throughout the country and has been before these men chosen for their experience in labor problems and for their impartiality as between labor and management. Without exception and in the face of the gratuitous advice of the Director of Selective Service, these arbitrators have expressed their views.

Following is a list of reported arbitrators' decisions on this issue, all in unanimous accord in rejecting the doctrine of superseniority.

Dow Chemical Co. and UAW-CIO, Nov. 29, 1945, Dudley E. Whiting, Arbitrator.

Timken Roller Bearing Co. and USA-CIO, March 13, 1945, Herman A. Gray, Arbitrator.

North American Aviation, Inc., Jan. 31, 1945, Clyde Emery, Arbitrator.

Firestone Tire and Rubber Co., Aug. 27, 1945, Board of Arbitrators.

New York Shipbuilding Corporation, July 27, 1945, Robert P. Brecht, Chairman of Adjustment Board.

3. Administrative Decisions

The same position has been taken uniformly by various divisions of the National War Labor Board during the period of its operation. In *Matter of Scovill Manufacturing Co.*, 21 WLR 206, the First Regional Board denied a proposal by the employer that returning veterans should be granted absolute job priority in accordance with the Memorandum and confirmed the report and recommendations of its panel which stated:

"The Company's request should be denied because the panel is of the opinion that the request, as well as Memo-

randum 190-A is inconsistent with the intent of the Selective Service Act. The intent of the latter is not to give positive benefit to the returning serviceman but to protect him against loss of seniority he would otherwise have obtained."

In *Matter of Jamestown Metal Equipment Co., Inc.*, 17 WLR (July 14, 1944) at 252, the Second Regional Board denied the Company's request that employees in the armed forces be granted double seniority for time spent in such service, adopting instead the panels' unanimous proposal that:

> "The period of absence of any employee of the Company in the armed services of the United States shall be equivalent to employment in the Company for the purpose of determining seniority."

The Bureau of Labor Statistics, before the Selective Service Administration took any position on the issue, stated:

> "The Selective Service Act as well as union agreements seeks to give maximum assurance that a returning veteran who left a permanent job has equal chances with those who remained and a prior claim *over those who were taken on during his absence in military service.*" (Military Service and War Job Clauses in Union Agreements (Aug. 1942).)

Thereafter the Solicitor of the Department of Labor, in a statement issued to the United States Conciliation Service for the guidance of federal conciliators in dealing with problems relating to the re-employment rights of veterans, declared (16 LRR 485):

> "The Department of Labor interprets certain provisions of the Selective Service and Training Act differently from the Selective Service Administration. These interpretations of the Department of Labor are no more binding than the interpretations of the Selective Service Administration. They are maintained, however, not only by the Department, but also by business institutions, and labor organizations. Accordingly the commissioner of conciliation should be informed of these interpretations as well as the interpretations of the Selective Service Administrator.
>
> "I shall state the major questions which are outstand-

ing at the present time and the interpretations which have been made.

Superseniority

"Question: Is a returning veteran entitled to re-employment even if the number of jobs in the employing establishment has been reduced to such an extent that he would have been laid off or discharged had he remained continuously in employment rather than entering the military service?"

"Answer: It is the view of this Department that the statute should be construed to entitle a veteran to restoration of his job rights in accordance with the seniority system or other system or relative status existing in the plant (or, if none exists, to preference according to dates of first employment by the employer, due consideration being given to continuity of employment), with accumulation of seniority for the time spent in the armed services. The statute should be construed as providing that the veteran's relative seniority rights (or their equivalent, if no plant seniority system exists) determine, not only his right to re-employment (with whatever upgrading or other benefits employees with equivalent seniority or status who did not enter the armed forces became entitled to during his period of service), but also his rights during the succeeding year to upgrading and promotion and against demotion or layoff (as distinguished from discharge). Thus it is our view that the returning veteran is entitled to his place on the seniority list in the business establishment and that the statute does not call for the displacement of senior workers in the event the force has been reduced to such an extent that the issue is raised.

Layoffs

"Question 2: Assuming a veteran has been restored to his job and a subsequent reduction in employment would require that he be laid off under the seniority rules of the establishment, does Section 8 prevent such layoff for one year from the date of his restoration to employment?

"Answer: The Department of Labor interprets the term 'discharge' as applying only to the final termination of an employee's connection with the company. It does not apply to 'layoffs'. Accordingly, the status of a restored veteran during the first year of his return to employment would depend on his position on the seniority list.

"The Director of Selective Service takes the view, however, that 'a veteran who has been restored to his former position cannot within one year be displaced by another on the ground that the latter has greater seniority rights.'"

The position of the Department of Justice on the issue of superseniority has a somewhat spotted background. For a substantial period of time, and down to the point at which the present case was pending in the Circuit Court of Appeals, the Attorney General had simply instructed his District Attorneys to the effect that the superseniority interpretation "is not free from doubt under the Act". The District Attorneys were therefore advised, in bringing actions on behalf of veterans in accordance with their duty under the Act, to take no position on the issue but to present the considerations pro and con "with full candor".

When the present case was argued in the Circuit Court of Appeals in January 1946, more than a year and a half after the superseniority doctrine was first enunciated by the Director of Selective Service, the Department of Justice was apparently persuaded to resolve its doubts and to file a brief *amicus curiae*. Among the signers of the brief was an attorney formerly associated with the Director of Selective Service.

We cannot agree that there is even any "doubt" as to the invalidity of the position of the Director of Selective Service. The significant fact, however, is that in an examination of the weight of administrative authority we find that the Selective Service Administration was for a long time the only agency of Government sponsoring the superseniority doctrine. Today there is added only the somewhat delayed and hesitant affirmation of the Department of Justice.

4. The Selective Service Director's Interpretation Is Entitled to No Weight

The "superseniority" interpretation created by the Selective Service Administration was issued four years after the Act was passed. It was not adopted as the result of any hearing or investigation in which interested and affected parties were given an opportunity to express their views. It was not adopted pursuant to or following any court decision establishing any such interpretation. It followed four years of

uniform assumption that Section 8 provided for accumulated and not superseniority (a full discussion of this aspect of the issue is found in 54 Yale Law Review, page 417, Note 38).

Finally the interpretation was issued by an agency which has no function other than to establish a personnel division "with adequate facilities to render aid in the replacement in the former positions of persons who have completed their service." The agency has no power to hold hearings, find facts, issue orders, take any steps to compel compliance, enforce the statute, or interpret it. The Selective Service Director has no function which empowers him to place an interpretation on the statute which is entitled to any special weight, beyond its own merits, in the courts.

CONCLUSION

In conclusion, we should like to refer very briefly to an issue which apparently will be raised for the first time in this Court. We have been advised informally that it is the intention of the Department of Justice to urge that no decision be rendered on the merits in this case on the grounds that the failure of the employer to participate in the appeal from the District Court to the Circuit Court presents a fatal jurisdictional defect.

We cannot conceive that such an issue can be urged by the Department of Justice. The union was admitted without objection as an intervening party in the District Court. The appeal by the union to the Circuit Court of Appeals was challenged on no grounds other than the merits of the issue of statutory interpretation involved in the case. The issue which is now reportedly to be made by the Solicitor General was in no way involved in the application for certiorari to this court.

The union is a direct party to a contract embodying rights of substantial significance, financial and otherwise, to the members whom the union represents. The decision of the District Court directly and adversely affects that contract and those rights. There would seem, therefore, to be very little merit to any such issue as is now reported to be contemplated.

The problem of superseniority has created untold difficulty for labor, management and veterans. Those difficulties will increase and become more complicated as any final decision

on the issue is delayed. It was presumably in recognition of this fact that the Department of Justice sought and secured exceptional speed in the scheduling of this case for argument. There would be a strange anomaly in any attempt on the part of the Department at this stage of the proceeding to seek to avoid a direct ruling on the basic issue.

On the merits the statute states a clear, simple and unambiguous principle. It requires restoration of the veteran to all of the rights, status and benefits attaching to his position, including any which have been added in his absence and including an accumulation of seniority during his period in the armed forces.

It is vital for the effectuation of the principles of Section 8 of the Selective Service and Training Act of 1940 and for the best interests of American veterans, their fellow workers and industry generally that this Court reject the superseniority doctrine and follow the simple requirements of the language of Section 8.

Respectfully submitted,

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